

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1303

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- v -

ALPHONSE RICE,

Defendant-Appellant.

On Appeal From The United States District
Court
For The Southern District Of New York

APPELLANT'S BRIEF

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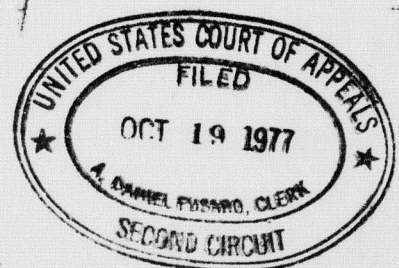


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QUESTIONS PRESENTED

1. WAS THERE INSUFFICIENT EVIDENCE TO
SUPPORT A JUDGMENT OF CONVICTION ON
COUNT 1 AND 3?
2. DID THE COURT ERR IN ADMITTING
EVIDENCE OF RICE'S RECEIPT OF
ILLEGAL BENEFITS?
3. DID THE COURT ERR IN DENYING
DEFENDANT'S MOTION TO DISMISS THE
INDICTMENT FOR UNDUE PRE-TRIAL DELAY?

STATEMENT PURSUANT TO RULE 28[3]

Preliminary Statement

ALPHONSE RICE appeals from a Judgment of the United States District Court, Southern District of New York, [Brieant, J.] convicting him of conspiracy to defraud the VA [Count 1] and with making false statements and entries in a matter within the jurisdiction of that agency [Count 3]. 18 U.S.C. 371, 1001 and 2. Defendant was acquitted of removing records from the VA files [Count 2] 18 U.S.C. 285.

RICE was sentenced on June 10, 1977 to nine months in prison on Count 1 and 3, to run concurrently with each other. This sentence was to run concurrently with a previously imposed sentence of probation by J. Gagliardi.

He is on bail pending appeal of his conviction.

FACTS

From September, 1974 until 1976 ALPHONSE RICE worked for the VA in New York City. In March, 1975 he began working in the Educational Claims Section of the Adjudication Division processing claims for educational benefits. Landis Dothard also worked for the VA in New York but as a field representative in the Educational Benefits Unit.

In July, 1975, pursuant to an internal investigation at the VA office it was found that Dothard had been illegally receiving educational benefits since January, 1974 [T-86].^{1/} This lead to an investigation of other employees and in September it was found that RICE, along with other employees, had also been improperly receiving benefits since September, 1974.

Further investigation showed that on March 26, 1975, Dothard and RICE jointly signed a three year lease for an apartment in Queens with a monthly rent of \$464. The lease was dated May 1, 1975 and contained a provision for a three month rent concession. [T 41-42] There was no evidence as to when RICE and Dothard actually moved into the apartment [T 50-51].

There was, likewise, no evidence that RICE and Dothard had anything but the most transient contacts until March, 1975 although there was testimony that they came from the same town in Alabama [T-222].

1. "T" references are references to the trial transcript.

Both RICE and Dothard claimed a wife and three children as dependents, which was untrue.

On May 30, 1975, approximately 30 days after the Dothard-Rice lease was signed, RICE approved an increase in benefits for Dothard. This approval was effectuated by the completion of a "scan sheet" [A-16]^{2/} prepared by the Adjudication Unit. The information contained on the "scan sheet" was obtained from the claimant's file ["C" file] and supported by recent documentation of continuing attendance at school, or the addition of new dependents. [T 217-230].^{3/}

Upon completion of the "scan sheet", it would be deposited in a common box in the unit and collected at the end of the day. There would be no further check of the "scan sheets" against the information contained in the "C" file.

The issue of whether a claim adjudicator having personal information about a claimant could substitute this knowledge for the documentation submitted by the claimant arose on the cross-examination of Robert Sschmidt, Mr. Rice's supervisor:

"The Court: . . . A man is given a claim form to process. The claim form says that the veteran is married. He's acquainted with the veteran and understands he is not married. Does he have any duties under the circumstances?"

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2. "A" references are references to the Appendix.
 3. Additional defendants could be added through marriage, the birth of a child or the support of a parent. Applications for increased benefits were often informally made through a letter or certification by a claimant.

A. He is to process the claim based on the evidence in the folder.

Q. And he doesn't have to put his own knowledge to work?

A. No Sir." [T-175]

It should be noted that Dothard had made three previous applications for benefits to which he was not entitled and they were all approved in the same manner as was his May 30th application. On each prior occasion the approving claims officer was someone other than Rice [T-178]. Indeed, RICE only began working in the Adjudication Unit on March 18, 1975, long after Dothard had begun receiving illegal benefits.

On September 26, 1974, RICE's "C" folder was transferred from the Newark Regional Office to the New York Regional Office by Georgie Canty, a fellow employee. She was employed in the Correspondence Unit [T-213] and the file was requisitioned by her for RICE, because:

" . . . he said he wanted to just get benefits and he wanted to expedite the benefits." [T-232]

A "sign out" card was prepared and signed by RICE [A-17] indicating that the file had been taken to the Adjudication Unit. Subsequent entries, however, showed that persons other than RICE signed out his folder for various legitimate purposes

on October 30, 1974, November 15, 1974, December 11, 1974, June 19, 1975 and June 27, 1975 at which time it was transferred back to Newark [T 243-244].

Indeed, a notation on the "sign out" card showed that the file was in the custody of the Veteran's Administration as late as December 9, 1975 [T-256].

However, at the time of the instant indictment, [February 16, 1977], both RICE's and Dothard's "C" folder could not be located and both were charged with violation of 18 U.S.C. 285, to wit, removing and presumably destroying their claim folders.

During the trial, evidence was introduced over counsel's strenuous objections concerning RICE's unauthorized Veteran Administration benefits^{4/}. [T-28, 69, 73-76, 188-189, 192-194, 201, 206]. Paranthetically, RICE has repaid all monies due the Veteran's Administration for these overpayments in benefits. [T-207]

Pre-Trial Delay

On March 14, 1977, defendant moved to dismiss the indictment on the grounds that the extensive pre-indictment

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4. No claim was made by the Government that defendant did not attend a legitimate educational institution. [T-188]

[T-212-233]. Defendant, at the time of indictment was 27 years old. But for the delay in bringing this case to trial, the defendant would have been eligible for the federal Young Adult Offenders Act [18 U.S.C.4216], which would have been available to Rice in 1976 but not 1977. In addition, Mr. Rice's recollection of events faded over the three year period that he was under investigation.

ARGUMENT

Point I

THERE WAS INSUFFICIENT EVIDENCE
TO SUPPORT A JUDGMENT OF CON-
VICTION ON COUNT 1 AND 3.

Count 1 of the instant indictment charges that defendant Dothard conspired to defraud an agency of the United States, to wit, the Veteran's Administration [See A-3]. Count 3 charges that defendant covered up a material fact within the jurisdiction of a government agency [A-6]. Following the government's case defendant moved under Rule 29 for a trial order of acquittal on the grounds that the evidence was insufficient to sustain a verdict of guilty [T 264-267].

A motion addressed to the sufficiency of the evidence under Rule 29 FRCP must be granted, if, taking the view most favorable to the government, there is not "substantial evidence to support the verdict." United States v. Jiminez-Serrato, CA5 [1971] 451 F.2d 523:

"Substantial evidence . . . means evidence that a reasonable minded jury . . . could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." United States v. Jiminez, supra]

The evidence must do more than raise a mere suspicion of guilt. A conviction cannot be based upon evidence which is consistent with both innocence and guilt. United States v. Ortiz, CA 10 [1971] 445 F.2d 1100, Cert. Den. 92 S.Ct. 541; United States v. Swarthout, CA 6 [1970] 420 F.2d 831; Lewis v. United States, CA 10 [1970], 420 F.2d 1089; United States v. Harris, [1970] 435 F.2d 74 CA-D.C. Cert.Den. 91 S.Ct. 1675.

This rule had not been accepted in the Second Circuit until 1972 when this Court conformed its rule to the other circuits in United States v. Taylor, CA 2 [1972] 464 F.2d 240, followed by United States v. Freeman, CA 2 [1974] 498 F.2d 569 and United States v. Brower, CA 2 [1973] 482 F.2d 117.

In the case at bar, taking the evidence most favorable to the government, a jury could find that defendant was receiving benefits to which he was not entitled. Although evidence shows RICE receiving these benefits from September, 1974 until June, 1975, there is not one scintilla of evidence that these benefits were received through the aid, connivance or assistance of Dothard, the alleged

co-conspirator.^{5/}

Indeed, the lease arrangement relied upon by the government to establish a motive for RICE to assist Dothard^{6/} was not entered into until March, 1975, nine months after RICE had made an alleged false application for benefits for the 1974-1975 school year and more than fifteen months after Dothard began receiving illegal benefits. Indeed, there was no evidence to show that defendant and Dothard were more than casual acquaintances until March, 1975.

Most of the illegal benefits received by Dothard were received before RICE even began working in the Adjudication Unit [March, 1975]. Indeed, three other claims examiners had approved increases for Dothard prior to RICE.

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5. For some reason known only to the prosecution, defendant was never charged with defrauding the government but merely conspiracy to do so. Even the court was puzzled by the government's failure to charge him in the indictment. On page 194 the following transpired:

"The Court: It is somewhat puzzling. I ordinarily don't comment on such things. Why didn't they just indict him for the false claim Mr. Bentley? He probably would have conceded that. What's going on here? Conspiracy, and two more substantive counts . . . " [T-194]

No satisfactory answer was forthcoming from the government.

6. The government alleges that RICE assisted Dothard to insure that Dothard would not default on his share of their joint obligation under their lease arrangement. It should be noted that they had a joint income of over \$25,000.

It is elemental that before a conspiracy can be proven, an agreement between at least two parties, must be shown. See Orchard, "Agreement in Criminal Conspiracy", 1974 Criminal Law Review, p.297. It is the agreement that satisfies the requirement of an "actus reus."

It is also elemental that the agreement may be tacit or explicit but clearly there must be some proof of an understanding between the conspirators to do any illegal act.

The processing of Dothard's "scan sheet" by RICE on May 30, 1975 was seen by the government as powerful evidence that RICE and Dothard had conspired to defraud the government. The implication was that RICE had been living with Dothard since March 27, 1975, a period of one month [although there is no evidence as to when they actually moved in together] and consequently should have known that Dothard's application was fraudulent. This presupposes that RICE was privy to Dothard's family background, a supposition in no way supported by any concrete evidence, and that his approval of Dothard's application, even assuming he knew it to be false, was done pursuant to some agreement, tacit or verbal, to defraud the government.

Dothard was not called nor was any other witness called to substantiate this theory. Indeed, the government's

own witness, Robert Schmidt, testified that claims examiners were not to substitute his own knowledge of the background of a claimant for documents and evidence within the claims folder [T-175].

The government also theorizes that the mysterious disappearance of Rice's and Dothard's claims folders shows such parallel conduct as to suggest that they conspired together. This Court has held that a parallel course of illegal conduct does not establish the necessary conspiratorial intent. United States v. Falcone, 311 U.S. 205 [1940]; United States v. Koch, 113 F.2d 982 CA 2 [1940]; Wenger v. United States, 47 F.2d 692 CA 9 [1931].

Federal and other courts have gone far in finding an agreement based upon very sketchy, informal proof. See United States v. Miller, 508 F.2d 444 [CA 7, 1974]. [Dyer Act conviction upheld on evidence showing defendant and co-defendants were found in a stolen car]. Shetsky v. Oklahoma, 290 P.2d 158 [1955] [Stolen merchandise found in vehicle occupied by defendant and co-defendant]; Dye v. Georgia, 90 Ga. App.736 [1954] [Defendant was identified as "casing" restaurant before two co-defendants were arrested inside for burglary]. But in the case at bar, even

the minimal requirements of some agreement are absent.

This tendency of dispensing with the necessity of finding a definite agreement to conspire has been severely criticized by Mr. Justice Jackson in United States v. Krulewitz, 336 F.2d 408 [1956]

In Krulewitz, Justice Jackson stated at page 449, in his well known opinion, as follows:

"It [a conspiracy] also may be trivialized, as here, where the conspiracy consists of the concert of a loathsome panderer and a prostitute to go from New York to Florida to ply their trade . . . and it would appear that a simple Mann Act prosecution would vindicate the majesty of federal law. However, even when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case." [Emphasis supplied]

Justice Jackson then continued to analyze all of the obvious inherent dangers of a trivial, speculative conspiracy charge which more properly should be dealt with as a simple substantive crime.

In the case at bar, the government's proof consisted of no more than speculation and surmise.

The government theorizes that because both Dothard and RICE received illegal VA benefits, that they did so in conspiracy with each other. Yet, there is no proof of this. The government surmises that because Dothard and RICE associated with each other in a single apartment, that they knew of each other's plans. This Court has consistently held that mere association or even knowledge of an illegal scheme is insufficient to make one a conspirator. See United States v. Garguilo, 324 F.2d 795, CA2 [1966]; United States v. Milby, 400 F.2d 702 CA5 [1968]; Jones v. United States, CA10 [1966] 365 F.2d 87; United States v. Anderson, CA6 [1965] 352, F.2d 500; Butler v. United States, CA10 [1952] 197 F.2d 561; Mays v. United States, CA8 [1958] 261 F.2d 662; United States v. Gauza, CA5 [1970] 462 F.2d 949.

Indeed, even close similarity of conduct does not necessarily establish proof of conspiracy. Nipp v. United States, CA10 [1970] 422 F.2d 509 Cert.Den. 397 U.S.1008. Nor does passive acquiescence establish a conspiracy. A defendant must have some interest in aiding the co-conspirator in the criminal venture. United States v. Stanich, CA2 [1977] 550 F.2d 1294.

The fact that RICE began working for the VA in September, 1974 [T-221] and that Dothard had already been receiving illegal benefits since January of that year should argue strongly against any conspiratorial agreement. One could reasonably ask, if Dothard were successfully defrauding the government for nine months before RICE even began working for the VA, why would Dothard require RICE's assistance

after that? Indeed, it was not until 14 months after Dothard began receiving illegal benefits that RICE began working as a claims examiner, the only position from where RICE could be of assistance to Dothard.

The government urges that RICE assisted Dothard to insure that Dothard had sufficient funds to pay his share of the \$464.00 monthly rent. Yet, pursuant to stipulation [T-280] it was determined that just on base salary alone RICE was receiving \$10,278 per year and made over \$1,500 on overtime. In addition, he received almost \$4,000 per year on benefits. Dothard earned up to \$13,000 in salary and before RICE authorized an increase in benefits, he was receiving over \$4,000 from the Veteran's Administration. The added benefits obtained as a result of RICE's approval action amounted to an insignificant increase - hardly a convincing motive for RICE to help Dothard.

One must also ask, what did Dothard do for this alleged conspiracy? How did he further the ends of the conspiracy, one of the ends being for RICE to obtain Veteran's Administration benefits to which he was not entitled?

Indeed, the trial record is devoid of any single act done by Dothard to assist RICE in obtaining educational benefits.

The total lack of proof of any conspiratorial agreement and simple logic argues strongly against this conviction. As Justice Jackson said in the Krulowitz decision [supra p.12].

"The modern crime of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid. It is always 'predominantly mental in composition' because it consists primarily of a meeting of minds and an intent."
[at p. 446]

POINT II

THE COURT ERRED IN ADMITTING
EVIDENCE OF RICE'S RECEIPT
OF ILLEGAL BENEFITS.

The introduction of information concerning benefits received by RICE was error. The court clearly should not have admitted this evidence until the establishment of the clear existence of a conspiracy. See United States v. Stanich [supra p.13].

Indeed, there is not one shread of evidence to show that anyone aided RICE in receiving benefits from September, 1974 to June, 1975, through the aid of another party [that being the period of the school year and benefits were applied for in September, 1974]. It is elemental that two persons are required to form a conspiracy. The government concedes that if a conspiracy was formed between Dothard and RICE it was formed following the signing of the joint lease. Presumably, this provided the parties with the necessary motive. How was this information concerning RICE's benefits relevant? The government suggests that it was necessary to establish a motive for RICE to destroy his VA file, one of the charges against him.

It this is the only reason, the prejudice to the defendant was so overwhelming as to far outweigh any

possible probative value of this information.

The jury acquitted on the second count, but one could readily believe that upon hearing of RICE's defalcations, they were loathe to have him walk away without some punishment. Defendant should have been indicted for defrauding the government and perhaps still may be. But he was not charged with this in the instant indictment through reasons known best to the government and should not have had to defend on this charge. It would be crediting a jury with powers of mental gymnastics which is totally belief by reality to believe they could disregard this highly inflammatory material. It would also fly in the face of Rule 403, Federal Rules of Evidence, and strip it of all meaning.

Rule 403 reads, as follows:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." [Emphasis Supplied]

The evidence of RICE's defalcations was so insignificantly probative of Count 2 as to be virtually irrelevant. Even if relevant, the evidence was so fraught with prejudicial potential that it should have been excluded. Indeed, the court should have seen the flimsiness of the evidence as to Count 2 and dismissed the count under Rule 29. Indeed, not even a cautionary instruction as to this evidence was given.

POINT III

THE COURT ERRED IN DENYING
DEFENDANT'S MOTION TO DISMISS
THE INDICTMENT FOR UNDUE PRE-
TRIAL DELAY.

As far back as September, 1975 the government was fully aware of the essential facts involved in this indictment. They had no more information in September, 1975 concerning Mr. Rice's relationship with Mr. Dothard than they had at the time of the indictment in February, 1977. The matter under investigation by the United States Attorney was not complicated nor were there numerous individuals involved requiring extensive expenditures of time or the use of numerous investigators. There were no wiretaps and all of the evidence were public records under the control and custody of the Veteran's Administration or in the control of cooperative individuals or companies. For example, one bit of evidence relied upon heavily by the government was a lease signed by both Rice and Dothard. The renting agent was fully cooperative in opening up their records to the government. The information concerning the lease was known to the government in September, 1975.

Indeed, as late as January, 1976, defendant appeared before the Grand Jury pursuant to subpoena. Yet,

from January, 1976 until February, 1977, a period of thirteen months, the government did not indict on this simple matter. Indeed, on March 2, 1976, Mr. Dothard was indicted for his part in the alleged scheme. Significantly, it was not until September, 1976 that the government subpoenaed the rental agreement heretofore mentioned although they had knowledge of such an agreement for over one year prior to this time.

Rule 48[b] of the Federal Rules of Criminal Procedure, provides in pertinent part, as follows:

"[b] If there is unnecessary delay in presenting the charge to a grand jury the court may dismiss the indictment . . ."

It is not argued that this indictment should be dismissed solely because of a substantial time lapse. Rather, it is a combination of factors, all tending towards a showing of unreasonably governmental neglect and consequent prejudice to the defendant that this relief is sought. This court has repeatedly held that the pre-indictment delay is fatal only if it is an intentional device by the government to gain a tactical advantage over the accused. United States v. Mejias, 552 F.2d 435 CA2 [1977]. But as a trial judge stated:

"The government is deemed to intend the normal and probable consequences of its own act. If you show unreasonable delay, the court can infer that it was intentional."
[Transcript dated March 18, 1977, p.20]

Federal courts have consistently sought to tighten up the prosecutorial disposition of investigations and trials. Most outstanding is the passage of the Speedy Trial Act of 1974, 18 U.S.C. 3161 and the transitional implementing rules of this Court. Nor have the federal courts been loathe, in proper cases, to dismiss for undue delay. See United States v. Washington, 504 F.2d 346 [1974] CA 8; United States v. Marian, 404, U.S. 307 [1971].

Defendant has clearly been prejudiced by the failure of the prosecution to move more expeditiously. The most obvious area of prejudice was the ineligibility of the defendant under the Young Adults Defendant's Act, 18 U.S.C. 4216. Had the defendant been prosecuted expeditiously, he may well have fallen within the scope of that statute. Indeed, in 1976, the defendant was still eligible under the provisions of the Act having not attained his 26th birthday until 1977.

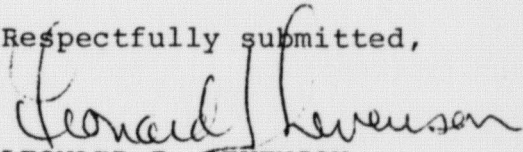
Secondly, in late 1976, the defendant was charged with an unrelated offense. This offense was known or should have been known to the prosecution and had an indictment been handed down in 1976 in the instant case, the two matters could have been consolidated and in all probability, a more satisfactory plea arrangement or sentence would have been imposed. The prosecutorial format amounted to the equivalent of piecemeal prosecution often condemned by this Court.

delay deprived defendant of due process. The prosecutorial investigation of this case shows that as far back as September, 1975 the government was aware of RICE's relationship to Dothard. They were also aware that RICE had approved Dothard's "scan sheet" for increased benefits. Indeed, RICE had been discharged from the Veteran's Administration in early 1976 as a result of the Veteran's Administration investigation. Although additional investigations by the F.B.I. continued, the only added factor which came to light therefrom was the testimony of Georgie Canty, a witness of no real consequence to the government [T 212-233]. Defendant, at the time of the indictment was 27 years old. But for the delay in bringing this case to trial, the defendant would have been eligible for the federal Young Adult Offenders Act [18 U.S.C. 4216], which would have been available to RICE in 1976 but not 1977. In addition, RICE's recollection of events faded over the three year period that he was under investigation. Lastly, RICE was separately charged in 1976, with an unrelated offense which could have been consolidated with the instant charge for a more advantageous disposition or sentence had the government brought this indictment in 1976.

CONCLUSION

THE CONVICTION OF DEFENDANT
SHOULD BE REVERSED AND THE
INDICTMENT DISMISSED.

Respectfully submitted,


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Dated: New York, N.Y.
October 6 , 1977

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